



# The Courts, Public Health, and Legal Preparedness

Daniel D. Stier, JD, Diane Nicks, JD, and Gregory J. Cowan, MA

The judicial branch's key roles, as guardian of civil liberties and protector of the rule of law, can be acutely relevant during public health emergencies when courts may need to issue orders authorizing actions to protect public health or restraining public health actions that are determined to unduly interfere with civil rights. Legal preparedness for public health emergencies, therefore, necessitates an understanding of the court system and how courts are involved in public health issues.

In this article we briefly describe the court system and then focus on what public health practitioners need to know about the judicial system in a public health emergency, including the courts' roles and the consequent need to keep courts open during emergencies. (*Am J Public Health*. 2007; 97:S69–S73. doi:10.2105/AJPH.2006.101881)

*We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution.*

—Charles Evans Hughes  
(*American Jurist and Statesman*,  
1862–1948)

*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*

—Oliver Wendell Holmes, Jr  
(*The Path of the Law*,  
Harvard Law Review, 1897).

## THE JUDICIAL BRANCH OF THE

US system of government stands as the guardian of civil liberties and protector of the rule of law. The critical role that our courts play is particularly important during emergencies. At such times, courts may, for example, issue orders authorizing certain actions to protect public health. Courts may also intervene to restrain public health actions that are determined to unduly interfere with civil rights. Legal preparedness for public health emergencies, therefore, necessitates an understanding of the role of the courts in the US system of justice and the involvement of the courts in public health issues.

To effectively perform its role, the judiciary may periodically require enhanced understanding of a public health issue. Public health officials must also be thoroughly familiar with judicial rules and procedures and be ready to bring the presiding jurist up to speed on the law and facts. Put simply, public health officials, as well as their attorneys, must know their way around the courthouse.

Recognizing that mutual understanding is particularly important with regard to public health emergencies, we focus on the courts' critical roles in and preparedness needs for such emergencies. As an essential backdrop, we provide an introduction to the structure and function of federal and state courts and describe how federalism requires state and federal

courts to share power. We then address what public health practitioners need to know about the judicial system in a public health emergency, including the role of the courts and the consequent need to keep courts open during emergencies. Finally, we describe tools that are being developed to assist courts in performing their important tasks during a public health emergency.

Although this article is devoted to the courts' roles in and preparedness needs for public health emergencies, it is important to understand that outside of the public health emergency context disputes involving every type of public health issue may be taken up in court. Those issues may arise from public health areas as diverse as environmental protection, injury prevention, eradication of nuisances (i.e., hazardous waste, unsanitary conditions, and so on), reproductive health, and infectious disease control.

## JUDICIAL SYSTEM STRUCTURE AND FUNCTION

### Background

Similar to other types of disputes, those involving public health ultimately may be resolved in the courts. For example, the century-old landmark US Supreme Court decision in *Jacobson v. Massachusetts* held that public health officials were authorized to require smallpox

vaccination while simultaneously establishing the principle that public health officials may not unduly interfere with the fundamental rights of individuals.<sup>1</sup> Public health disputes present issues of public welfare that demand efficient, yet careful and correct resolution. The parties in these cases face special challenges including, for example, the need for public health officials and other parties to disputes or those involved in actions to understand the workings of the court system, or the need for judges to understand certain technical issues about public health or to make relevant evidentiary determinations.

Public health officials ordinarily spend little time in court. Consequently, they frequently lack a working knowledge of this particular system in which their public health actions will be tested. Judges, on the other hand, rise to the bench from various types of law practice; many were criminal prosecutors and possess criminal law expertise. Others were civil trial lawyers and have expertise in areas such as tort law. However, judges generally lack background and expertise in many specialized areas of law, including public health. Therefore, when a legal issue involving public health is in need of judicial resolution, judges must be “educated” on both the relevant law and public health considerations. Depending on the type of case,



judges, or the juries sitting in their courtrooms, may also need to be fully informed on technical or scientific facts, epidemiological or otherwise, to make appropriate factual findings.

### Structure and Function

At the federal level, the courts' dispute resolution role has its foundation in Article III of the US Constitution, establishing the federal judiciary to resolve "cases and controversies" involving federal law or certain parties. State judicial systems are similarly established by state constitutions for the purpose of resolving cases and controversies generally involving state and local laws. The structures of the federal and state court systems are established by the US Congress and state legislatures, respectively. In public health emergency and other contexts, court actions could take several forms, including affirming and enforcing an order of a public health official as a proper exercise of discretion, overturning an order of a public health official for lack of statutory authority, or striking down a public health law or order for unduly interfering with an individual's constitutional right to liberty.

### Federal Courts

Article III, Section 1 of the Constitution directed Congress to establish the Supreme Court. It is the US court of last resort. In a small number of cases, the court has original jurisdiction.<sup>2</sup> Otherwise, the court generally has discretion over whether to take an appeal. Appeals are usually initiated with the filing of a

writ of certiorari from either a US court of appeals or a state supreme court.<sup>3</sup>

Congress creates "inferior courts" under the discretion granted by Article III, Section 1. There are 94 federal trial courts, called district courts.<sup>4</sup> District courts hear civil and criminal cases. Public health cases can arise in a criminal context, but generally are civil in nature. Most civil cases arise under either the courts' "federal question" jurisdiction or "diversity" jurisdiction.<sup>5</sup> Federal questions are simply those arising under the Constitution, laws, or treaties of the United States. Diversity jurisdiction most commonly exists where the controversy is between citizens of different states or citizens of a state and citizens or subjects of a foreign state. The disputed amount in a diversity case must exceed US\$75 000.

The district courts are organized into 12 regional circuits, each with a court of appeals.<sup>4</sup> A court of appeals hears appeals of decisions arising from the district courts within its circuit.<sup>6</sup> Appeals are heard and decided on the basis of the record made before the district court.

### State Courts

The caseload of the federal courts is vastly exceeded by that of state courts for both civil and criminal cases.<sup>7</sup> State courts handle virtually all cases involving divorce and child custody, probate and inheritance, real estate, and juvenile issues and most cases involving criminal prosecution, contract disputes, traffic violations, and personal injury.<sup>7</sup>

Most public health cases are decided in state courts.

Each state, the District of Columbia, and Puerto Rico has its own court system. The state systems have structural characteristics that are generally similar to those of the federal judicial system. All include a court of last resort, typically called the Supreme Court. Most states have an intermediate court of appeals. All have courts of general jurisdiction, and most have courts of limited jurisdiction. Although sharing general characteristics, there is wide variation in the structural details of state court systems. For example, Georgia's court system includes courts of general jurisdiction, called superior courts, 8 additional types of limited jurisdiction courts, and 2 levels of appellate courts. On the other hand, the entire court structure in North Dakota consists of a unified trial court and a single appellate court of last resort.<sup>8</sup>

### A SYSTEM BASED ON FEDERALISM

The US system of government is based on federalism—a sharing of powers between the federal and state governments. The system is framed by the US Constitution in Article I, Section 8, and the Tenth Amendment. Article I, Section 8, authorizes the federal government to make the laws "necessary and proper" to execute the powers listed in the article. Chief among those powers with respect to most issues, including public health, are the power to tax and spend and the power to regulate com-

merce. The Tenth Amendment reserves to the states all of the powers not listed in Article I, Section 8.

Likewise, the US court system is based on the principle of federalism. Thus, state courts retain all powers not granted to the federal courts by the Constitution. They have jurisdiction over claims arising out of state constitutions and laws, and unless prohibited by federal law, may also be able to hear and decide issues involving the US Constitution and federal laws. In a public health context, legal issues generally involve the exercise of police power by public health agencies. Although not expressly referenced in the Constitution, the existence of the police power is universally recognized by the courts as the power reserved for the states for the creation and implementation of laws to protect the public's health, safety, and welfare. Consistent with this broad reserved power, most public health laws and regulations reside at the state (and local) level. State courts have jurisdiction over issues arising out of those state laws and regulations. Not surprisingly, therefore, cases involving public health legal issues are most commonly filed and resolved in state courts. Although state courts are generally the forum for resolution of public health disputes, it is particularly important in a public health emergency context for public health officials to recognize the sharing of judicial power between federal and state systems and to be prepared to efficiently and effectively address legal issues that could be raised in either system.



## COURTS AND PUBLIC HEALTH EMERGENCIES

Whether occurring naturally or as the result of an intentional act, widespread outbreaks of severe infectious diseases potentially pose unique challenges for the judicial system. As demonstrated by the severe acute respiratory syndrome outbreak in 2003, some communicable infectious diseases can spread rapidly and may create a need to quarantine thousands. In Toronto, Ontario, approximately 30 000 individuals were quarantined, and virtually all of them voluntarily complied.<sup>9</sup> However, voluntary compliance cannot always be reasonably presumed.

An infectious disease outbreak may cause public health officials to subject individuals or groups to involuntary civil confinement, such as isolation, quarantine, or other compulsory “social distancing” measures. Under such circumstances in the United States, the judicial system, as guardian of civil liberties and protector of the rule of law, would serve to ensure that those measures do not unduly interfere with the rights of individuals or groups. At a minimum, the courts would strive to guard against such undue interference by providing procedural due process protections, including (1) adequate written notice of grounds for the proposed action and underlying facts; (2) access to legal counsel; (3) right to be present at the hearing, to cross-examine, and to confront and present witnesses; (4) a standard of proof requiring clear, cogent, and convincing evidence; and (5) access to a transcript for the purpose of appeal.<sup>10</sup>

## Courts Must Remain Open During Emergencies

To perform their important role, courts must of course remain open during a public health emergency. The potential for public health events to disrupt judicial operations is exemplified by the smallpox epidemics of 1636 and 1659, which caused relocations of the General Court of the Massachusetts Bay Colony to sites outside Boston, and another epidemic in 1702 that required the New York Supreme Court to convene on Long Island. Until recently, these examples may have been thought of as interesting but irrelevant historical footnotes. But judicial interest in planning for recovery from disasters, already stimulated by the 2001 World Trade Center, Pentagon, and anthrax attacks, was reinforced by the dramatic adverse impact of recent hurricanes on court operations Louisiana, Mississippi, Alabama, and Florida. In the immediate aftermath of Hurricanes Charley, Francis, Ivan, and Jeanne in 2004 and Hurricanes Dennis, Katrina, Rita, and Wilma in 2005, courts were forced to suspend operations, relocate, or temporarily close. Orders were issued to close court operations, suspend deadlines, and, in some instances, authorize practice by affected lawyers in jurisdictions other than where licensed. Courts around the country were asked to volunteer supplies, equipment, and other resources. The National Center for State Courts responded to the Katrina disaster by adding to its Web site a “Clearinghouse for Courts Affected by Hurricane Katrina,” which updated information

on court operations affected by Hurricanes Katrina and Wilma.<sup>12</sup> Some courts have developed “disaster recovery plans.” Those that have not are encouraged to do so.<sup>13</sup>

Beyond planning for recovery from devastation caused by hurricanes or other natural disasters, courts are recognizing the need for an “all hazards” approach to emergency contingency planning for other potentially catastrophic events, such as an influenza pandemic or a bioterrorism event such as a “dirty bomb.” Although courts must have plans in place for “picking up the pieces” after a disaster, they also need to develop and exercise contingency plans to enhance their ability to continue essential operations during any type of emergency. The continued functioning of the judicial system is critically important to public health officials: the unavailability of the courts would mean that public health officials and affected citizens would be deprived of the mechanism for resolving disputes that may be triggered by public health emergency actions.

During catastrophic infectious disease outbreaks or other public health emergencies, providing timely due process access to the courts for large numbers of persons may create serious logistical difficulties for the judicial system. Such difficulties might be compounded by the threat posed by potentially infectious persons to judges, lawyers, and other court staff. Moreover, courtroom hearings conducted in the usual “face-to-face” manner would be inadvisable without taking additional precautions; an alternative

would be to use electronic methods of communication, such as 2-way closed circuit television or telephone conferencing. If, however, even some of these methods proved insufficient, then courts might determine it necessary to approve curtailment of even some essential proceedings through the issuance of blanket orders or other measures that in nonemergency situations would be considered inappropriate.

A leading example of collaborative efforts to address these sorts of issues is the “Florida State Courts Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic.”<sup>14</sup> Although “lessons learned” from hurricanes have placed Florida at the forefront of judicial emergency planning, Florida courts nonetheless recognize that an influenza pandemic would have impacts distinct from those experienced during and after hurricanes. Florida courts, therefore, availed themselves of pandemic influenza information available at the national level and consulted with Florida Department of Health officials. The courts concluded that a pandemic scenario would likely increase the number of court filings as a result of quarantine, isolation, or other public health actions restricting the movement of individuals, that a significant number of personnel necessary to perform mission-essential functions within the court system would be unavailable because of illness, and that face-to-face contact would likely be inadvisable. The plan sets forth short- and long-term objectives for dealing with a pandemic scenario and



prescribes tasks and tools for accomplishing the objectives.

The activities of courts in California, Michigan, and Indiana provide additional examples of judicial public health emergency preparedness progress. Public health input, similar to that provided to the Florida Supreme Court for development of its pandemic influenza strategy, has been provided to California courts in the form of a document titled *Epidemics and the California Courts*.<sup>15</sup> This document provides background information concerning epidemic disease transmission, communicable diseases of concern, public health response to disease outbreaks, and the role of the courts in disease outbreaks.

The Michigan Supreme Court has developed a Business Continuity and Emergency Procedures Plan, which is designed to provide an emergency judicial assignment process.<sup>16</sup> This plan establishes a communication link between the State Court Administrative Office and the Michigan Office of Attorney General, lists statewide primary and back-up contacts for the Office of Attorney General, establishes primary and secondary contacts for each of 4 judicial regions, and provides contact information for the judges responsible for covering each region. The plan also prescribes 2 sets of processes and procedures, depending on the level of emergency: the procedures relating to emergency level 1 (critical) are designed to ensure immediate access to judicial resources; those relating to emergency level 2 (urgent) are intended to obtain access to

judicial resources as soon as practicable. In Indiana, the Division of State Court Administration and the Judicial Conference Court Management Committee are in the process of developing a template to be used by trial courts in developing continuity of operations plans, with special emphasis on the public health aspect of disaster recovery.<sup>17</sup>

### PUBLIC HEALTH TOOLS

Interested representatives of the judiciary and public health officials have recently been collaborating on the development of public health law “bench books.” Bench books are commonly used by judges as functional practice guides designed to accelerate their understanding of an area of law. Courts in most states, for example, typically have civil and criminal law bench books. In Indiana, the recently developed public health law bench book devotes particular attention to legal authorities relating to public health emergencies. The Indiana bench book was the first bench book in the country devoted to public health law, and it is serving as a template for the development of bench books in other states.<sup>18</sup> As states refine their approaches to bench book development, some are devoting a portion to a treatise-like discussion of public health law, intended for use by public health officials, state and local public health attorneys, and the public. A “practice supplement” or “application section” is then designed to provide useful, easily accessible law of practical and immediate use to

judges, perhaps with cross-references to the broader treatment.

Law and public health conferences and seminars are exploring the role of the judiciary in public health, and federal and state working groups increasingly recognize the judiciary as an important component of public health readiness. For example, in May 2006, the Bureau of Justice Assistance, part of the US Department of Justice, convened a meeting of experts representing the judiciary, law enforcement, corrections, and public health to address efforts for joint preparedness for pandemic influenza.<sup>19</sup> Thus, public health officials may seek new opportunities to work cooperatively with the judiciary and judicial education agencies in developing resources like public health law bench books, participating in judicial education seminars, and planning for public health emergencies.

### APPROACHES TO ASSISTING COURTS IN PREPAREDNESS

As public health officials approach courts about preparedness issues, they must recognize that, even under the direst of circumstances, most courts would be reluctant to authorize significant due process “shortcuts.” Likewise, courts may be somewhat wary of engaging in planning discussions with public health officials regarding those sorts of measures, particularly because the judiciary values its independence: judges base their decisions on the law and facts of each case, and courts will never

permit *ex parte* communications (discussion of the merits of a case between the judge and a party to the case outside the presence of other parties).<sup>20</sup> Furthermore, public health officials may encounter some judicial reluctance to discuss in the abstract the circumstances, if any, under which judges might consider deviating from normal due process standards.

Public health officials can consider making attempts to identify justices or judges who are interested in public health emergency preparedness. When approaching those members of the judiciary regarding plans for public health emergencies, public health officials should focus the discussion on strategies and mechanisms that should be available to courts in public health emergencies should courts decide to use them. The circumstances under which those strategies and mechanisms would be used should appropriately and respectfully be left for judicial determination.

### CONCLUSIONS

The judicial system resolves legal disputes relating to public health. Public health agencies must anticipate the need to articulate to courts the legal and factual underpinnings of their actions. Similarly, agencies and their attorneys must develop a thorough understanding of court jurisdiction, practices, and protocols. With particular regard to legal issues relating to preparing for and responding to public health emergencies, public health officials should work with courts





to develop contingency plans for equitably and efficiently resolving those issues. Although the independence of the judiciary prohibits discussion of the substance of those issues, there is no bar to joint planning of the means and methods of resolving those legal issues in the event of a public health emergency. Judges and public health officials can cooperate to ensure that actions taken to protect public health have a solid legal foundation and respect the rights of individuals affected by those actions. ■

### About the Authors

Daniel D. Stier is with the Public Health Law Program, Centers for Disease Control and Prevention, Atlanta, Ga. Diane Nicks is a Circuit Court Judge in Dane County, Madison, Wis. Gregory J. Cowan is with the Florida Office of the State Courts Administrator, Tallahassee.

Requests for reprints should be sent to Daniel D. Stier, Public Health Law Program, Centers for Disease Control and Prevention, 1600 Clifton Rd, Mail-stop D30, Atlanta, GA 30333 (e-mail: DStier@cdc.gov).

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### Contributors

D.D. Stier researched and analyzed the role of the judicial system in public health emergencies and wrote the article. D. Nicks and G.J. Cowan reviewed drafts of the article and assisted in the analysis and description of the judicial system's role in public health emergencies.

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Human participants were not involved in the research reported in the article.

### References

- 197 U.S. 11 (1905)
- 28 U.S.C. § 1251.
- 28 U.S.C. §§ 1254, 1257.
- Administrative Offices of the US Courts. Understanding the Federal Courts. Available at: <http://www.uscourts.gov/understand03/media/UFC03.pdf>. Accessed on January 11, 2007.
- 28 U.S.C. §§ 1331, 1332.
- 28 U.S.C. § 1294.
- National Center for State Courts. Examining the Work of State Courts. Available at: [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Overview.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Overview.pdf). Accessed on January 11, 2007.
- National Center for State Courts. Available at: [http://www.ncsconline.org/D\\_Research/Ct\\_Struct/Index.html](http://www.ncsconline.org/D_Research/Ct_Struct/Index.html). Accessed on January 11, 2007.
- Public Health Agency of Canada. SARS in Canada: anatomy of an outbreak. Available at: [http://www.phac-aspc.gc.ca/publicat/sars-sras/naylor/2\\_e.html](http://www.phac-aspc.gc.ca/publicat/sars-sras/naylor/2_e.html). Accessed on January 11, 2007.
- Greene v. Edwards*, 263 S.E. 2d 661 (1980)
- Hopkins DR. *Princes and Peasants: Smallpox in History*. Chicago, Ill: University of Chicago Press; 1983.
- National Center for State Courts. Homepage. Available at: <http://www.ncsconline.org>. Accessed on February 2, 2006.
- National Center for State Courts. Do You Have a Disaster Recovery Plan? Available at: <http://www.ncsconline.org/What'sNew/NewsAlerts/NewsAlertHaveRecoveryPlan.html>. Accessed on January 11, 2007.
- Florida State Courts. Emergency preparedness. Available at: [http://www.flcourts.org/gen\\_public/emergency/index.shtml](http://www.flcourts.org/gen_public/emergency/index.shtml). Accessed on January 11, 2007.
- California Department of Health Services. Epidemics and the California Courts. Available at: <http://www.dhs.ca.gov>. Accessed on March 29, 2007.
- Michigan Supreme Court. Business Contingency and Emergency Procedures Plan. Available at: [http://www.michigan.gov/documents/Attachment\\_A\\_97106\\_7.pdf](http://www.michigan.gov/documents/Attachment_A_97106_7.pdf). Accessed on January 11, 2007.
- O'Brien C. Division of State Court Administration and the Judicial Conference Court Management Committee to Begin Disaster Recovery Planning project in 2006. *Indiana Court Times*: 2005;14:6. Available at <http://www.in.gov/judiciary/admin/court-times/news14-3.pdf>. Accessed on January 11, 2007.
- Centers for Disease Control and Prevention. Public health law program. Available at: <http://www2a.cdc.gov/phlp>. Accessed on January 11, 2007.
- US Department of Justice. *Justice and Public Health Systems Planning: Confronting a Pandemic Outbreak*. Chicago, Ill: Bureau of Justice Assistance, US Department of Justice; 2006. Available at: [http://www.ojp.usdoj.gov/BJA/pandemic/pandemic\\_main.html](http://www.ojp.usdoj.gov/BJA/pandemic/pandemic_main.html). Accessed on January 11, 2007. Another example is: Florida Office of the State Courts Administrator. *Florida State Courts Prepare: Planning for Pandemic as Part of an All-Hazards Approach*. Orlando, Fla: Florida Office of the State Courts Administrator; 2006.
- Though ex parte communications are generally prohibited, some jurisdictions permit a party to seek an ex parte order under very limited circumstances, usually involving notice to other parties and an opportunity to subsequently be heard. 56 Am. Jur. 2d Motions, Rules, and Orders §45.